The only solution to this time-honored issue of "justice delayed, justice denied" is to train and detail to the EEO Branch the most competent and sensitive staff available elsewhere in the Commission, at least until the backlog is cleared up.

4. PARTTIME HIRES SHOULD BE CONSIDERED IN EVALUATING EEO PERFORMANCE, AS SHOULD THE FAILURE TO HIRE EVEN PARTTIME EMPLOYEES. A PARTTIME EMPLOYEE SHOULD BE DEFINED AS A FICA EMPLOYEE (RATHER THAN AN INDEPENDENT CONTRACTOR) WORKING AT LEAST TEN HOURS PER WEEK.

Some licensees argue that their hiring of parttime minority employees should be considered in mitigation of a failure to hire fulltime or top four category minority employees. This argument has value only if counterbalanced by a willingness on the Commission's part to recognize that a failure to hire even parttime minorities cuts in favor of designation for hearing.

Furthermore, the Commission should recognize that a parttime hire requires less commitment than a fulltime hire, and is thus less indicative of EEO compliance than a fulltime hire. Moreover, many people classified as parttime are not employees at all, but independent contractors or even persons employed by others (such as program suppliers or syndicators) whose voices are heard occasionally on the air. Thorough documentation of the legitimacy of a claimed parttime employee (including records of FICA contributions showing at least ten hours a week of work) should be required before she is used to defend an EEO inquiry.

5. THE SECOND GENERATION OF EEO COMPLIANCE EFFORTS SHOULD INCLUDE MEASURES TO INSURE EQUAL OPPORTUNITY FOR THOSE

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memorably announced the Chairman's initiative as "Deny the Petition Day."

WHO HAVE GOTTEN IN THE DOOR THROUGH THE FIRST GENERATION OF EEO COMPLIANCE EFFORTS.

a. Promotion, retention, training, working conditions, compensation and termination are the earmarks of post-hiring affirmative action compliance.

The EEO Rule covers recruitment, employee selection, working conditions, compensation, transfers, promotions, training, discipline, termination, and in the case of cable also cover the purchase of goods and services. However, the Commission's EEO enforcement program has focused almost exclusively on recruitment.

For example, the Commission never reviews data on employee selection -- which could reveal discrimination -- unless Form 396 reveals deficiencies in an entirely different area, recruitment.

This regulatory practice is illogical. It has the effect of relieving from EEO scrutiny the most common form of discriminator: the licensee or franchisee which is careful to send job notices to minority groups, but which deliberately and discreetly fails to hire minorities. Indeed, the only licensees or franchisees which get caught at hiring discrimination tend to be those too stupid or unsophisticated to conceal their discriminatory hiring practices behind EEO-friendly paper recruitment practices. For example, in Columbus, Ohio Renewals, 7 FCC Rcd 6355, 6359 ¶25 (1992) (on reconsideration) ("Columbus") the Commission held that a licensee -- even when under the enhanced scrutiny of a petition to deny and reporting conditions -- was immunized from hearing albeit it had hired no minority

applicants. It was enough that the minorities applied:

> We note that, although the licensee did not hire minorities during the time it was not subject to reporting conditions, its efforts attracted several minority applicants. We, therefore, find no evidence that the licensee engages in discrimination.

That holding is far outside the mainstream of civil rights jurisprudence. It has been repeatedly rejected in EEO cases. See, eg., Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981). On Columbus' theory, a hotel with 100 Black tourists standing in line could give all of its rooms to Whites but escape Title II review because its advertising had attracted the Black tourists. See Katzenbach v. McClung, 379 U.S. 294 (1964) and Heart of Atlanta Motel, Inc. v. U.S., 379 U.S. 241 (1964). A school district which segregates Black children would be excused from Title VI review because Black children attend its school system. See Lau v. Nichols, 414 U.S. 563 (1974). A municipality would be excused from compliance with the Voting Rights Act's prohibition against racial gerrymandering because it registers Blacks to vote. See Gomillion v. Lightfoot, 364 U.S. 339 (1960).

Recruitment efforts might theoretically have some weight in showing that a licensee obeyed 47 CFR §73.2080(c)(2) or that a franchisee obeyed 47 CFR §76.75(b). However, the Commission should hold that recruitment efforts -- especially paper recruitment ministerially conducted without personal contact with minority groups -- will not immunize licensees from sanctions for noncompliance with 47 CFR §§73.2080(c)(3) and (c)(5) (which aim

at selection and hiring procedures) and 47 CFR §73.2080(a) (nondiscrimination), and will not immunize franchisees from sanctions for noncompliance with the parallel rules 47 CFR § 76.75(d)(1) (selection and hiring) and 47 CFR §76.73(a) (nondiscrimination).

An all-too-common example of the Commission's narrow focus on recruitment is found in cases in which the Commission has refused to consider allegations that minorities are segregated into only certain types of jobs, to the exclusion of others. Carolina Radio of Durham, 74 FCC2d 571 (1979) (Blacks not hired as officials and managers; licensee gently urged to conduct job structure analysis); Field Communications Corp., 68 FCC2d 817 (1978) (minorities concentrated in professional and technical jobs, excluded from management and sales; licensee gently admonished); Independence Broadcasting Co., 53 FCC2d 1162, 1166 (1975) ("Independence") (Blacks steered only to positions in Black formatted AM in AM/FM combination; conditional renewal issued). The practice is referred to as "ghettoization." Cable EEO, supra, 58 RR2d at 1588 n. 32. One very likely reason for job segregation or exclusion is that the licensee or franchisee does not consider these types of positions appropriate for minorities. See Rust, supra, in which the Commission found a prima facie case of discrimination where the only Black employee was denoted the "maintenance supervisor" but was really the janitor, and the licensee's purported EEO program characterized only certain types of jobs as "suitable" or "feasible" for

minority applicants.

Discrimination in job placement and assignment is a serious matter. It is no answer to such an allegation that the licensee or franchisee recruits minorities. By that standard, every antebellum plantation owner would have passed muster on the EEO rules. They not only recruited Blacks, they imported them.

Virtually every civil rights enforcement body is two generations beyond the days when litigation focused on simply getting minorities in the door. The right to sit at restaurant tables and the front seats of buses, the right to get a bank loan based on merit, the right to buy or rent a dwelling, the right to register to vote, and the right to attend a nonsegregated school are matters settled years ago. So is the right to be recruited and hired. Now that the first generation of broadcast enforcement has succeeded in placing minorities in entry level jobs, it is time for the Commission to insist that licensees train and promote them so that full equal opportunity may eventually be achieved.

b. The Commission Should Develop a Model Recordkeeping System that will Improve Compliance with the 5-step EEO Program Requirements.

In 1987, the Commission incorporated into Section 73.2080 of its rules the EEO requirements and guidelines known as the 5-point Program Report.[6] This program comprises the core of the Commission's "efforts-based" policy and spells out the duties and obligations of broadcast licensees - dissemination of the EEO

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[6] 1987 Report and Order, para. 14.

program, use of qualified referral organizations, self-evaluation of the employment profile, nondiscriminatory job promotion, and self-analysis of the effectiveness of its EEO program.[7]

Over the years a large number of EEO sanctions have been imposed due to the inability of broadcasters to document compliance with the 5-point program throughout the license term. According to FCC staff, the most frequent cause of EEO audit failures is the absence of a record-keeping system and/or failure to properly recruit.[8]

A record-keeping system is the heart of any EEO program. If an operator documents its EEO practices, it is in a better position to self-assess its efforts and recruit women and minorities appropriately.

In order improve compliance, Commenters recommend that the Commission devise a model recordkeeping system. Recordkeeping is more than a technical procedure. Ongoing recordkeeping is evidence of substantive compliance throughout the license term. Secondly, self-assessment - the fifth, and perhaps most important of the EEO program requirements - requires the maintenance of a systematic recordkeeping system.

The model developed by the Commission should consist of a record structure and file descriptors (e.g. female and minority applicants from referral organizations, media advertisements, recruitment meetings, contacts with minority organizations).

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[7] 47 C.F.R. 73.2080 (c)(1)-(5).

[8] Interview with staff of FCC EEO Branch on February 14, 1993.

As a model system, licensees would be free to adapt it to fit circumstances of their individual station or fully implement the model developed by the Commission. For small broadcasters that do not have the time or resources to design their own recordkeeping system, the model could assist in the development of in-house training.

The overall goal of the model should be to facilitate compliance. To that end the structure of the system should mirror the guidelines contained in the Commission's rules (47 C.F.R. 2080 (c)(1)-(5). In order to verify compliance the model must be easily auditable by both the general public and the FCC.

In the past, EEO compliance has mainly consisted of completing forms and reports at the time of license renewal. Commenters seek to achieve an improvement in EEO recruitment and promotions by requiring licensees to employ an ongoing system that will enable them to document and evaluate their EEO activities.

6. THE USE OF MINORITY CONTRACTORS SHOULD BE COVERED BY THE BROADCAST EEO RULE AND ENFORCED VIGOROUSLY.

Information on the use of minority and female entrepreneurs has been required of cable operators since 1985. 47 CFR §76.76(e)(1). There is no logical reason why cable operators, but not broadcasters, should develop normal business contacts with minorities and women. Apart from developing minority and female economic power, these contacts often lead to the type of shared-interest networking which evolves into increased employment of minorities and women by licensees.

7. PRIVATE ATTORNEYS GENERAL SHOULD BE ABLE TO BE COMPENSATED FROM A PUBLIC INTEREST FUND WHEN THEY TRY EEO CASES IN HEARING.

This idea, developed by Citizens Communications Center in the 1970s, is needed now more than ever. The task of trying a hearing requires enormous work; it is a fulltime job and is usually done pro bono in EEO cases. The creation of such a fund would enable the Commission to make use of the considerable trial skills of the private bar in developing a record in hearing cases.

8. WHERE EEO NONCOMPLIANCE INFECTS AN ENTIRE GEOGRAPHIC MARKET, THE COMMISSION SHOULD DESIGNATE A FACT-FINDER (SUCH AS AN ALJ) TO CONDUCT A PUBLIC FIELD HEARING UNDER SECTION 403 OF THE ACT.

In the past, the Commission entirely eschewed even educational or informational review of systematic marketwide EEO noncompliance. That is a mistake which this Commission should correct.

Broadcasting and cablecasting are insular industries in which normative behavior within a community often defines and mediates the behavior of any one company. Thus, some communities have strong traditions of outstanding EEO compliance by their licensees (eg. Seattle, Washington, D.C.) and some have strong traditions of discrimination (eg. Salt Lake City, Las Vegas, Grand Rapids).

Affirmative action -- or the lack of same -- is quite frequently the result of marketwide action or consensus. The Commission explicitly recognized this when it began collecting Form 395 data. Nondiscrimination in Broadcast Employment, 18

FCC2d 240, 243 (1969) (pointing out the need to obtain a statistical profile of the industry as a whole). Thus, market-distorting mob psychology may inhibit minority advancement. While discrimination is practiced by individual licensees against individual job applicants and employees, affirmative action may be practiced -- or abstained from -- by individual stations or by a market collectively.

In most local markets, broadcasting trade associations or ad clubs exchange resumes or engage in promotional activities aimed at attracting minorities into broadcasting. They collectively organize seminars, internships, scholarships, recruitment tours, job banks, and community service efforts with local minority organizations. These marketwide endeavors promote the Commission's affirmative action goals as articulated in subsections (b) and (c) of the broadcast EEO Rule, 47 CFR §73.2080(b) and (c), quite apart from the actions of individual stations.

Similarly, by abstaining from these activities or by focusing industry-wide recruitment efforts on nonminority sources exclusively, the marketwide, collective efforts of broadcasters may work to the detriment of the Commission's affirmative action goals. In some markets, there have been almost no marketwide initiatives aimed at affirmative action. In a few markets, compliance with affirmative action rules is not considered appropriate behavior in nonminority business circles.

The collective apathy and indifference of broadcasters may

create a climate and culture of minimalist EEO compliance. Such a climate and culture can impede the serious compliance efforts of any individual licensee in two ways not visible to the Commission through a station by station application processing.

First, market distortions caused by marketplace social pressures and norms, enforced by racist advertisers and competitors, may force some stations to eschew contact with minority organizations or to generally avoid hiring minorities.

Second, a poor marketwide EEO climate and culture may mark a community, in the eyes of the highly mobile state and national minority broadcast workforce, as a poor place for minorities to work. Minorities may legitimately fear that if they should ever be terminated by a station in such a community, they may not find another job in the market and might have to uproot their families (often for a second time) to seek employment elsewhere. If nearly all of the stations in a market are weak EEO performers, there is little incentive for minorities with broadcasting skills to relocate to the community.

In refusing to investigate allegations of marketwide violations, the Commission has irrationally and unfairly erected procedural hurdles which could not be overcome with 100 years of litigation.[9]

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[9] In the 1970s and 1980's, the Commission was asked on at least six occasions to conduct marketwide EEO investigations. In Community Coalition for Media Change (1971 San Francisco Renewals), 34 FCC2d 183 (1972), the Commission acknowledged that it had §403 authority to undertake a marketwide investigation, but declined only because the petitioner had not supplied sufficient background data. In North and South Carolina Renewals, 45 FCC2d 1063 (1973),

An example is found in Lanser Broadcasting Corporation, 7 FCC Rcd 4254, 4255 ¶¶6-7 (1992) (reconsideration pending) ("Lanser") which denied an NAACP request for a marketwide inquiry, pursuant to §403 of the Act, to determine why all but one radio station in Grand Rapids appeared to be violating the broadcast EEO Rule.

The Commission's stated reason for denying the §403 investigation was that no case had been made of "overt discrimination by licensees." Lanser, supra, 7 FCC Rcd at 4255 ¶7.[10] However, Section 403 can be used for purposes other than enforcement. It can be used to inquire into "any question may

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and in Florida Renewals, 44 FCC2d 735 (1974), the Commission declined to conduct formal state wide investigations based in part on the insufficiency of the evidence, but it still examined statewide data and set out this data in its decisions. In Philadelphia Renewals, 53 FCC2d 104 (1975) (Commissioner Hooks dissenting as to the majority's decision not to conduct a §403 investigation), the Commission declined to hold a marketwide investigation in part because the data supplied by the petitioner covered only the first four years of Form 395 reporting by licensees, and the petitioner did not show that the Philadelphia media's alleged nonperformance was unique. In Chicago Renewals, 89 FCC2d 1031, 1034 (1982), the Commission denied the Chicago Latino Committee on the Media's request for a marketwide inquiry, citing North and South Carolina Renewals, Florida Renewals and Philadelphia Renewals. Finally, in Richey Airwaves, Inc., 53 RR2d 330, 338 n. 20 (1983) the Commission summarily denied NBMC's request for marketwide inquiries in three markets, citing Chicago Renewals.

[10] This appears to suggest that most of the stations in a market would have to be overtly discriminating before the Commission would see if the market itself is behaving abnormally. That suggestion implies that the Commission has no interest in EEO performance by stations performing only barely within the rules but sub-optimally, or in stations which violate the rules but not to the point that their licenses would be in jeopardy. The Commission's regulatory powers surely include prophylaxis and prevention as well as punishment.

arise under any of the provisions of this Act." One such "provision of this Act" is Section 303(g), directing the Commission to "[s]tudy new uses for radio...and generally encourage the larger and more effective use of radio in the public interest."

Proof that every station in a market discriminates is a ridiculously high predicate to a marketwide inquiry. Without discovery, such proof cannot be obtained in a hundred years.[11]

In some markets, overt violations of the affirmative action provisions of the rules by several stations can occasionally be shown in petitions to deny. When that type of evidence is received, it would ill serve the public interest if the Commission threw it away. If abnormal distortions of the marketplace are a root cause of suboptimal EEO behavior, the Commission must learn how these forces operate so as to avoid the futile exercise of sanctioning one station at a time in a vacuum.

A marketwide inquiry can provide a valuable learning opportunity both for the Commission and the licensees. These investigations need not be cumbersome, costly, or intimidating. The 1962 Chicago and Omaha television programming investigations

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[11] In 60 years, the Commission has only found that one station has engaged in overt discrimination. See Catoctin Broadcasting Corp. of New York v. FCC, 4 FCC Rcd 2553 (1989), recon denied, 4 FCC Rcd 6312 (1989), aff'd per curiam by Memorandum, No. 89-1552 (released December 18, 1990) ("Catoctin"). To persuade the Commission to undertake a marketwide inquiry, a petitioner to deny would have to make out and prove Catoctin type cases against most of the stations in a market. Given the Commission's institutional reluctance to hold hearings which could enable citizen complainants to prove discrimination (see pp. 52-53 infra), the sun will set in the east before a petitioner to deny could meet this test.

provided an excellent example. These were a simple public hearings, conducted without subpoenas by a visiting Commissioner, who then prepared a report. The purpose was non-adversarial. The hearing served a good and useful purpose and was well worthwhile. In the opinion of the Presiding Commissioner, the inquiry proved to be of mutual benefit to the public, to the broadcasters, and to the Commission, in that it established an avenue of communication for that part of the public which chose to be vocal. As a result of the hearing, the Presiding Commissioner believed that the public, the industry, and the Commission have learned much and must, therefore, have greater respect each for the other's problems and views. The Presiding Commissioner recommended that the Commission should, on a limited basis, from time to time, engage in further such inquiries in typical test markets of different kinds....In this conclusion a majority of the Commission is in agreement. We believe that by holding inquiries in such typical test markets, the Commission will gain much greater insight into the public interest problems associated with the particular kind of market. This in turn will enable us to better discharge our functions with respect to rule making, process, and all aspects of policy formulation.

In short, if we are to carry out the Congressional desire "to maintain, through appropriate administrative control, a grip on the dynamic aspects of radio transmission" (FCC v. Pottsville Broadcasting Co., 309 U.S. 134, 138), this type of inquiry is a most appropriate tool. In addition, the inquiry will, of course,

be beneficial to the stations and listening public in the particular areas, affording as it does an excellent forum for the exchange of views calculated to aid the broadcaster in making his judgment as to the needs and interests of the area.

Omaha TV Inquiry, 35 FCC 422 (1962). The subject matter (local programming) was far more controversial than EEO. See 47 U.S.C. §326.

Furthermore, unlike the regulatory regime in effect in 1962, the subject matter at issue here is now the only nonstructural means of meeting the objectives of Section 303(g) (not to mention Section 309) of the Act in the context of broadcast renewals. With minority employment in decline, the Commission must eschew no avenue by which it can learn why its EEO enforcement efforts are not always successful and what might be done to improve them.

9. THE COMMISSION SHOULD NEGOTIATE MEMORANDA OF UNDERSTANDING WITH SECTION 706 AGENCIES.

In the Civil Rights Organizations' experience, many EEOC offices are unaware of the existence of the FCC/EEOC Agreement, 70 FCC2d 2720 (1978) and do not report broadcast EEO complaints to the Commission. Furthermore, owing to the hostility of the EEOC in the 1970s and many federal judges then and now to civil rights complaints, many complainants forego the federal system entirely and take their chances at Section 706 agencies. These agencies do not report case filings to the FCC. To remedy this, the Commission should entire negotiate information sharing and case processing arrangements with Section 706 agencies, or ask the EEOC to include compliance with the FCC/EEOC Agreement among

the factors used to certify an local or state human rights agency under Section 706.

B. REVISIONS TO THE ANNUAL EMPLOYMENT REPORTS AND RELATED POLICIES

1. THE COMMISSION SHOULD REVISE THE NUMBER OF JOB CATEGORIES ON FORM 395. JOB TITLES SHOULD CLOSELY REFLECT JOB RESPONSIBILITIES.

For nearly two decades the Commission has used job classifications on the Annual Employment Report Form 395 that were devised by the Department of Labor. These categories are clearly inappropriate for the broadcast industry and hinder the ability to monitor the number of women and minorities in upper management.

The adoption of six new categories that would replace the category of "managers and officials" would greatly improve the Commission's enforcement efforts. The remaining eight classifications should be retained in order to compare future statistics with historical data.

Similar to the six job categories recently adopted for the cable TV industry, the new broadcast categories should collectively comprise those personnel who regularly meet to that determine overall station policy. The following job categories are consistent with that criteria:

Corporate Officers

General Manager

General Sales Manager

Senior Producer

Chief Technician

Comptroller

The previous category of "officers and managers" should be revised to "Manager".

Job titles should closely reflect the responsibility of the job overall category. For example, job titles within the senior producer category should be consistent with the responsibility of supervising other programming producers. Job titles within the category of "managers" should denote responsibility for the exclusive supervision of at least one other individual.

Form 396 should include enough information to enable the Commission to identify the racial composition of the hiring pool -- an essential element of any objective analysis of the success or failure of an EEO program. Presently, Form 396 only requires a listing of the number of minorities and women referred by each source. That information is of limited value. Six minorities out of 20 referrals yields a pool from which minorities have a chance to be hired, while six minorities out of 200 referrals is a pool in which minorities will scarcely be noticed. To obtain meaningful hiring pool data, the Commission can expand the job referral reporting section of Form 396 to include a breakdown of the race and sex of all applicants referred by particular sources.

Furthermore, Form 396 should require proof that affirmative recruitment efforts were undertaken for <u>each job vacancy</u>. Ambiguous and fuzzy references to "examples of sources used"

should be deleted. The omission of this simple step figures in almost every EEO case litigated before the Commission in the past sixteen years, including cases involving very large, sophisticated licensees. The law on this point is quite old. Sande Broadcasting Co., 58 FCC2d 139 (1976) (short term renewal issued largely because licensee conducted EEO recruitment efforts in filling only three of seven vacancies). Apparently, the Commission still doesn't have the industry's attention on this point, inasmuch as many stations still rely on the old-boy network for the jobs that really count, such as senior managers, salespersons and news reporters. To get the industry's attention, an "each job vacancy" recruitment requirement should be included on Form 396.

Finally, Form 396 should elicit the kind of contact is made with recruitment sources. The Civil Rights Organizations have encountered licensees who report job opportunities by telephone to nonminority sources, but recruit minority applicants with a Jim Crow mailing list, complete with cynical return cards to cover the applicant at renewal time. These mailings typically pious mouthings that the station is an "equal opportunity employer with no openings at this time." It is little surprise that minority professional organizations send few job notices under such an obviously source- segregated, impersonal solicitation which often seems designed to minimize the possibility that the licensee or franchisee will actually have to have personal contact with minorities in the community.

Form 396's recruitment, hiring and promotion data by race and sex in should follow the format used on Form 395. On Form 396, "minorities" are aggregated as though they are fungible. That is not the law. See City of Richmond v. J.A. Croson Co., 109 S.Ct. 706 (1989), holding that minority groups each have different experiences and histories and cannot be thoughtlessly lumped together in connection with race-conscious adjudication. As discussed at 49-51 infra, the Commission should devote the same diligence to enforcing the hiring and promotion portions of the EEO rules as it devotes to enforcing the recruitment portion of the rules.

2. PROMOTION DATA ON FORM 395 SHOULD BE BROKEN OUT BY RACE AND BY FULLTIME/ PARTTIME STATUS.

There is no logical reason why Form 395 should take a photograph of employment without also providing a photograph of promotions. This information would be useful in evaluating, on a year to year basis, whether minorities and women are merely going through a revolving door, or whether they may expect a genuine career with the licensee.

C. BILINGUAL INVESTIGATIONS

Full investigation of complaints alleging static or declining minority employment and ineffective EEO programs has been required since 1978, as a result of Bilingual Bicultural Coalition on the Mass Media v. FCC, 595 F.2d 621 (D.C. Cir. 1978) ("Bilingual II"). Citizen group petitioners to deny were to be given an opportunity to respond to a licensee's answers to

interrogatories propounded to licensees by the FCC staff. Id. at 634. Bilingual II is the leading broadcast EEO case, and EEO investigations are commonly referred to by communications lawyers as "Bilingual investigations."

Not until 1987, when Chairman Patrick took office, did the Commission begin conducting these investigations in response to petitions to deny, as Bilingual II had required.[12] Regrettably, most Bilingual investigations are rudimentary and leave much to be desired.

As presently conducted, Bilingual investigations are typically paper processes which ignore the most important factor in an EEO case -- potential victims of discrimination, especially those who may not know they were victims or who might be too frightened to come forward without Commission protection.

In 1988, the D.C. Circuit warned the Commission that a Bilingual investigation was patently insufficient when it included no contact with the Black former employees of a station which had terminated essentially all of them. Beaumont, supra, 854 F.2d at 505.

Yet since that time, as far as the public record shows, not once has the Commission sought out employees or former employees

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[12] In the first four years of Mark Fowler's chairmanship, the Commission performed exactly one EEO investigation (involving female employment at a South Dakota radio station). It had done over 200 investigations in the four years before his chairmanship. After he left the agency, the pace of investigations speeded manyfold. Since November, 1988, the FCC has opened up over 300 broadcast EEO investigations.

of any broadcast station or cable system to independently verify allegations of discrimination. Not once has a general manager or owner of a licensee or franchisee been interviewed -- even on the telephone -- in an EEO investigation. In any other law enforcement body, this would be a scandal.

The Commission staff almost never conducts field investigations of stations' EEO programs. Instead, it relies on "self-reporting," which is often self serving and fraudulent. Frequently, only accidental discovery of fraudulent reports results in a complaint.

Bilingual investigations are often helpful in rooting out EEO misconduct. However, the Civil Rights Organizations can never emphasize enough that licensee or franchisee control of all of the paperwork in a Bilingual investigation is a formula for the concealment of wrongdoing. Placing the burden of production and proof on a citizen group -- which only has access to Form 395 and Form 396 -- almost guarantees that a hearing case will seldom be made out. See Citizens for Jazz on WRVR, Inc. v. FCC, 775 F.2d 392, 397 (D.C. Cir. 1975) ("[i]t would be peculiar to require, as a precondition for a hearing, that the petitioner fully establish...what it is the very purpose of the hearing to inquire into"); Stone v. FCC, 466 F.2d 316, rehearing denied, 466 F.2d 331 (D.C. Cir. 1972) (petition cannot be rejected simply because petitioners lack access to internal station information).

Since Bilingual investigations began to be routinely designated in 1987, experience has shown a need to expand the

scope of these investigations in several respects. Under the current procedure, all of the paper flow is controlled by the applicant itself. It has exclusive access to the recruitment, hiring, promotion and termination data. Even in the absence of written data, it has access to individuals, such as current and former general managers, personnel directors, comptrollers, office managers and major department heads, who have personal knowledge and recollection of the facts.

Too often, a licensee can entirely escape serious sanctions, or a hearing, by claiming it didn't know it had to keep written EEO records. On occasion, licensees' serendipitous claims that they didn't know they had to keep EEO records are little more than thinly veiled fraud, propounded in the hope that the absence of written documentation will discourage the Commission from pursuing the matter to its rightful conclusion.[13]

While the Commission always rejects this claim of ignorance and sometimes issues forfeitures for these "recordkeeping" violations, it never takes the next logical step, which is to interview those with personal knowledge so as to reconstruct the missing records. In a station which has had few minority employees or applicants, it would be quite rare for a modest,

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[13] Sometimes -- such as where a licensee has already been through a Bilingual investigation -- a claim of poor recordkeeping may be made to conceal deliberate destruction of inculpatory documents. Such behavior smacks of serious abuse of process, being comparable to the fabrication or suppression of evidence. WWOR-TV, Inc., 7 FCC Rcd 636, 641 ¶40 (1992) (fabrication of evidence); Dorothy O. Schulze and Deborah Brigham, 6 FCC Rcd 4218 ¶2 (1991) (advising non-parties against attending depositions).

non-intrusive interview with the general manager and the personnel director not to yield evidence of the station's actual minority recruitment, hiring and promotion practices.

1. Far more Bilingual investigations should be performed on the Commission's own motion.

Most law enforcement agencies routinely perform investigations on their own motion. However, the Commission has come to rely almost exclusively on petitions to deny before it investigates broadcast EEO violations. Since 1988, the NAACP and LULAC have challenged an average of fifty license renewal applications per year. The Commission has investigated essentially all of these complaints. During that same time period, the Commission, on its own motion, has initiated only three EEO investigations resulting in sanctions. NAACP complaints are almost always deemed meritorious, which honors the NAACP but does not address the EEO deficiencies of the vast majority of licensees who are not the subject of NAACP complaints.[14/] The Commission's crabbed EEO regulatory agenda has regrettably focused on punishment of the three percent driving over 100 miles per hour while drunk, with little thought

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[14] The resources of NAACP and LULAC, the two most prolific challengers of renewal applications, have not permitted them to examine EEO compliance as to women. One unfortunate side effect of the absence of cases brought on the staff's own motion is that for several years, only one licensee has been sanctioned for violating the EEO rules as to women. In 1992, for example, the Commission decided EEO cases involving 50 broadcast stations; 47 of these had been brought by the NAACP. While noncompliance was commonly found, with licensees receiving admonishments or sanctions in 44 of the cases, not one case involved women.

given to some of the remaining 97% who drive over 80 miles per hour while sober.

2. All those receiving sanctions in a previous license or review term should receive a Bilingual letter upon their next renewal to insure against recidivism.

Even four license terms of EEO noncompliance, including one with drew sanctions have not been cause for any meaningful sanctions. Columbus, supra, 7 FCC Rcd at 6358-6359 ¶¶21-27. Because the license renewal terms for radio and television stations were extended in 1982 to seven and five years respectively, "progressive discipline" typically requires a generation -- if it ever happens. With most TV and radio stations being sold every several years, the discriminator is usually never caught. To remedy this, the Commission should announce a policy that EEO recidivists will automatically be deemed poor compliance risks, receive a Bilingual letter, and if found not to be complying with the EEO rule in a second license term, be designated for hearing.

At times, and as bizarre as it sounds, the Commission has ignored overwhelming statistical evidence even when that evidence showed that noncompliance did not stop with one license term. For example, in Champaign, supra, 7 FCC Rcd at 7171 n. 6, the Commission rejected the NAACP's uncontested allegation that during the fifteen year period planning 1975-1989, a licensee reported the employment of no full time minorities in eight years and no top four category fulltime minorities in twelve years, and reported no fulltime Black employees since 1980. The Champaign

Commission held that the Commission's policy was to disregard this type of data. Id.

That is irrational. Sometimes an applicant has barely escaped sanctions in earlier years, but has developed a record which suggests discriminatory intent when examined over a period of more years than are encompassed within one license term. This can happen, for example, when a licensee had a low annual employee turnover rate, so that the effects of discriminatory practices would only reveal themselves over a period of more than one license term. That is the case at many radio and television stations.

In such cases, the Commission should not hesitate to allow evidence of prior license terms' EEO nonperformance to determine whether the current license term's record is part of a longstanding pattern and practice.

While a licensee cannot be retroactively sanctioned for misconduct in previous renewal terms, a renewal does not act as an expungement order causing one renewal term's misconduct to vanish as evidence of a pattern reaching into successive renewal terms. Nothing about a license renewal prevents the Commission from subsequently noticing facts of record about a licensee's performance during the license term in question. NBMC v. FCC, supra (Commission directed to examine noncompliance in current license term in light of noncompliance in previous license term); BHA Enterprises, Inc., 31 RR2d 1373, 1404 (ALJ 1974) (reaching back four renewal terms to prove a "continuing pattern of conduct

of this licensee over the years which was violative of the Act and regulations...which calls for the imposition of the sanction of revocation of the licenses").

In two recent cases, the Commission has moved positively in the direction of considering multi-license term statistical data. See Price Broadcasting Company (Chief, Mass Media Bureau, released May 18, 1992) ("Price") (reporting the results of a Bilingual investigation based on charges of intentional discrimination during current and previous renewal terms); Heritage-Wisconsin Broadcasting Corp., 8 FCC Rcd 5607 (1993) (reconsideration pending) ("Heritage") (after mid-term Bilingual inquiry where the allegations did not refer to named victims but simply built a statistical case, established sanctions against various stations owned by the group on a record encompassing parts of two renewal terms). These are welcome steps in expanding the Commission's view of recidivism.

3. The scope of a Bilingual investigation should be the entire license period.

There is simply no rational basis for requesting only three or four of seven years of data in a Bilingual investigation. The licensee has to retain data for the entire term. Thus, it is an easy task for all concerned to supply and review it. The first three years of a seven year term are not an EEO "unsafe harbor" for minorities.

4. Bilingual investigations are seldom performed in a manner faithful to Beaumont. When significant numbers of minorities are terminated or are not hired, the Commission must contact those persons and learn their side of the story. Named Title